

Ref : KTBA/08.2023/080

Date : August 15, 2023

**Mr. Tauqeer Aslam,**  
Chairman,  
Appellate Tribunal Inland Revenue of Pakistan (HQ.),  
2nd Floor, Shaheed-e-Millat Secretariat,  
Near China Chowk, Blue Area,  
Islamabad.

Dear *Tauqeer Aslam, AOA*

**NON-ACCEPTANCE OF STAY APPLICATION WITHOUT NOTICE U/S 138 of ITO, 2001 (ATIR Circular)  
GRAVE IMPLICATIONS FOLLOWED**

This is wrt subject circular. After the Appeal Section of your Tribunal started refusing to admit Stay Applications without recovery notice under Section 138 of the Income Tax Ordinance, 2001, the risk of inevitable recovery has started hovering over your appellants who have been exposed to a vulnerable position where they have been left completely defenceless, at the mercy of the recovery officer without any respite from your Tribunal.

2- The unwarranted practice has begun following the instructions issued by the ATIR, HQ on August 02nd, 2023 through a circular.

3- A realisation on the part of Tribunal is unescapable that it's a known practice of the department that it simply doesn't allow sufficient time between the first recovery notice under Section 138 and the final recovery notice under Section 140. Needless to mention that Second and the final notice is sent directly to Banks or to Debtors for instant payment without any choice. Tribunal has adjudged dozens of cases on the issue.

**INHERENT HARDSHIP U/S 138:  
NO REASONABLE or PRACTICAL TIME**

4- Your necessary attention is urged onto the provision of section 138 of the Ordinance where the hardship factor is patent and gives birth to the legitimate cause of action to knock your door for justice in terms of asking for injunction/stay against the looming threat of recovery. We are reproducing hereunder the whole of the text of section 138 of the Ordinance so as to facilitate quick response:

**138. Recovery of tax out of property and through arrest of taxpayer.**

(1) For the purpose of recovering any tax due by a taxpayer, the Commissioner may serve upon the taxpayer a notice in the prescribed form requiring him to pay the said amount **within such time as may be specified in the notice.**

(2) If the amount referred to in the notice issued under sub-section (1) is not paid within the time specified therein or within the further time, if any, allowed by the Commissioner, the Commissioner ~~may~~ proceed to recover from the taxpayer the said amount by one or more of the following modes, namely:—



- (a) attachment and sale of any movable or immovable property of the taxpayer;
- (b) appointment of a receiver for the management of the movable or immovable property of the taxpayer;
- (c) arrest of the taxpayer and his detention in prison for a period not exceeding six months and
- (d) as specified under clauses (a), (ca) and (d) of sub-section (1) of section 48 of the Sales Tax Act, 1990.

**(3) For the purposes of recovery of tax under sub-section (2), the Commissioner shall have the same powers as a Civil Court has under the Code of Civil Procedure, 1908 (Act V of 1908), for the purposes of the recovery of any amount due under a decree.**

**(4) The Board may make rules regulating the procedure for the recovery of tax under this section and any other matter connected with, or incidental to, the operation of this section.**

As can be observed by a plain reading of the bare provision of Sub Section 1, duly highlighted for your ease, that there is absolutely no rule for any minimum number of days or even hours required for the officer to give notice for, before he initiates to empty the bank account of the taxpayer. Needless to mention that ATIR itself has dealt with appeals singularly on the ground of these unwarranted and unethical recoveries, innumerable.

#### **TRIBUNAL CANNOT RULE AGAINST IT OWN ETHOS**

5- It is, therefore, unimaginable as to how possibly the same Tribunal can bring out rules against its own ethos by completely alienating itself from the stark reality which its own past speaks for it and that too when it has most of the times given decision in favour of its appellant, salvaging it, realising that it fell to the mischief of application of a provision designed for illegal and unnatural recovery. We at the Bar understand that this basic level of cognition was missed while drafting the new circular.

#### **INEVITABLE RECOVERY: HAWKISH APPROACH OF THE DEPARTMENT**

6- Hence, therefore, since the law of tax recovery doesn't allow time to the appellant to (i) file stay application and (ii) cannot wait for it to get fixed and (iii) can't wait for it to get heard by a Bench and (iv) then can't wait for the Stay order to get hold of and (v) finally can't wait to get it delivered and submitted to the officer and to the bank, there is nothing, absolutely nothing, which can stop the department to strike recovery except for the Stay Order from your Tribunal. The stay application by your appellant in your office, therefore, is a genuine and a bonafide one, arisen out of acute need for respite as the hawkish department is not bound to wait for the taxpayer to even file the Stay and neither it is bound to wait for your Tribunal to act and react. It doesn't need to wait for any thing altogether.

7- It's inherent in the application of the recovery law that once the Commissioner appeal's order is passed the recovery drive can be activated without delay and without any estoppel. The notice under Section 138 without any provision for any minimum time to get the Stay or any minimum time to even file the Stay, therefore, is rendered meaningless to serve as a Recovery notice. The Commissioner Appeal's order rather, de facto, is. Therefore, by no means the taxpayer who is your appellant should not be snatched away with his right to file Stay application.





## **WHOLE PURPOSE OF APPEAL IS DEFEATED**

8- it merits a mention that the above departmental practice has evolved despite the fact that it has been settled by various higher courts that notice under section 138 should give fifteen (15) to the taxpayer to file the stay before your Tribunal.

9- In addition to the above explained scenario and legal position it has also been witnessed that contrary to courts decisions, which are binding precedents that issuance of notice under section 138, along with other procedural requirements, is mandatory before proceeding to any coercive action under section 140, the tax department, on the other hand prompted by tax collection targets, has proceeded to recover the tax demand directly under section 140 even without any notice under section 138 of the Ordinance.

10- The whole purpose of filing the Stay and filing the appeals, your would agree, gets defeated in the event these unwarranted situations are created.

## **LEGAL AND FUNDAMENTAL RIGHT: NON-DISPENSATION OF JUSTICE**

11- Your necessary attention is also desired on the provision of section 131 of the Ordinance where under the stay application is required to be filed and the tribunal is to admit the same considering the hardship involved. There is no room or provision, per se, under the law for any conditional acceptance of stay application including that of the availability of notice under section 138.

12- We, therefore, at Bar are of the considered view that the subject refusal of Stay application is not only a direct infringement on the fundamental rights of the taxpayer, it is also prone to jeopardise the settled judicial system resulting in a serious Non Dispensation of Justice.

## **WAY FORWARD**

Your urgent intervention is highly desired to redress the issue. We are the Bar are very much willing to have discussions on these lines and would like to hear from you.

Thanking You,

  
(Syed Zafar Ahmed)

President

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C.C to :

- i. **Ministry of Law and Justice, Government of Pakistan**
- ii. **Justice Aqeel Ahmed Abbasi, Senior Judge (Monitoring / Administrative Judge) of Tribunal, High Court of Sindh**
- iii. **Mr. Rana Munir Hussain, President, Pakistan Tax Bar Association.**
- iv. **Press and Media**